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October 7, 2005  
GDH/gdh

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re IQinVision, Inc.

Serial No. 76300952

Ellsworth R. Roston of Fulwider Patton Lee & Utecht for  
IQinVision, Inc.

Michael Kazazian, Trademark Examining Attorney, Law Office 113  
(Odette Bonnet, Managing Attorney).

Before Quinn, Hohein and Hairston, Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

IQinVision, Inc. has filed an application to register  
on the Principal Register the mark "IQEYE3," in standard  
character form, for "computerized digital cameras for use in  
security and surveillance applications" in International Class  
9.<sup>1</sup>

Registration has been finally refused under Section  
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that  
applicant's mark, when applied to its goods, so resembles the

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<sup>1</sup> Ser. No. 76300952, filed on August 16, 2001, which is based an  
allegation of a date of first use anywhere and in commerce of April  
2001.

mark "EYE Q," which is registered on the Principal Register in the special form shown below



for "digital cameras, photographic cameras and digital camera peripherals, namely printers and scanners" in International Class 9,<sup>2</sup> as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods or services at issue and the

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<sup>2</sup> Reg. No. 2,737,508, issued on July 15, 2003, which sets forth a date of first use anywhere and in commerce of September 20, 2000.

similarity or dissimilarity of the respective marks in their entireties.<sup>3</sup>

Turning first to consideration of the respective goods, applicant notes in its brief that its cameras are specifically identified "as computerized digital cameras for use in security and surveillance applications" while registrant's cameras are not so identified. Applicant contends that because its cameras, unlike those of the registrant, "are identified for use in a precisely defined and limited field," "[t]here is accordingly no likelihood of confusion between applicant's cameras and the registrant's cameras." Applicant also states that it "is prepared to provide a declaration that applicant has not experienced any instances of confusion in the marketplace between applicant's cameras and the registrant's cameras."

The Examining Attorney, on the other hand, correctly points out in his brief that it is well settled that the issue of likelihood of confusion is determined on the basis of the goods or services as they are respectively identified in the particular application and the cited registration. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d

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<sup>3</sup> The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." 192 USPQ at 29.

1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). In view thereof, and further citing In re Elbaum, 211 USPQ 639, 640 (TTAB 1981) and In re Optica International, 196 USPQ 775, 778 (TTAB 1977), the Examining Attorney persuasively argues that "since the identification of the registrant's digital cameras is very broad, without limitation as to a specific purpose or use, it is presumed that the registration encompasses all goods of the type described, including those in the applicant's more specific identification, that they move in all normal channels of trade and that they are available to all potential customers." We thus concur with the Examining Attorney that:

[A]pplicant's argument that its cameras "are identified for use in a precisely defined and limited field," and its conclusion that there is no likelihood of confusion because the registrant's cameras "are not identified for use in this precisely identified and limited field," are without merit. The plain wording in each identification indicates that the goods consist of digital cameras, and the registrant's goods are not limited to any specific purpose or function.

Furthermore, we also agree with the Examining Attorney's finding that the goods at issue herein are legally identical in part since, as the Examining Attorney accurately observes, it is clearly the case that "the registrant's broadly identified 'digital cameras,' [being set forth] without any limitation as to use or purpose, can be interpreted to encompass all digital cameras, including those in the applicant's more

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specific identification." The contemporaneous use of the same or similar marks in connection with such legally identical goods would accordingly be likely to cause confusion as to the source or sponsorship thereof. Moreover, as to applicant's claim that it "has not experienced any instances of confusion in the marketplace between applicant's cameras and the registrant's cameras," suffice it to say that the record not only fails to contain an affidavit, declaration or other evidence in support thereof, but in any event an asserted lack of any incidents of actual confusion is a meaningful factor only where the record demonstrates that there has been appreciable and continuous use by applicant of its mark in the same market(s) as those served by registrant under its mark. See, e.g., Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992). Specifically, there must be evidence showing that there has been an opportunity for instances of actual confusion to occur and here the record is devoid of any such proof. See, e.g., Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000).

Turning, therefore, to consideration of the respective marks, applicant argues in its brief that its "IQEYE3" mark is distinguishable from registrant's "EYE Q" mark. In particular, applicant maintains that:

1. Applicant's mark is different from the cited registration because applicant's trademark includes the letter "I" at the beginning of the mark. The letter has added significance because it is the first letter in applicant's mark[.] The cited reference does not include the letter and certainly does not include the letter "I" as the first letter in the trademark.

2. The cited reference constitutes a design. Applicant's trademark does not constitute a design. The appearance of applicant's trademark is accordingly quite different from the appearance of the trademark in the cited registration.

3. Applicant's trademark includes the numeral "3". There is no numeral in the trademark of the cited registration.

Notwithstanding such differences, we agree with the Examining Attorney that the marks at issue are confusingly similar, especially when used in connection with legally identical goods. As stated by our principal reviewing court in *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), "[w]hen marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Here, the Examining Attorney asserts, applicant's mark "is highly similar to the [registrant's] mark ... because it shares the identical term EYE in relation to the term IQ. The Examining Attorney also insists that the "slight differences" between the marks at issue fail to "obviate the similarity between the marks ... [so as to ] overcome a likelihood of confusion." In particular, the Examining Attorney contends that "the shared dominant term EYE, used to create the phonetic term IQ, is likely to cause the average consumer to retain a similar overall commercial impression of the marks."

When considered in their entirety, it is obvious that applicant's mark and registrant's mark share substantial similarities in sound, appearance, connotation and commercial

impression. Although, in registrant's "EYE Q" mark, it is the word "EYE," rather than a letter "I" as in applicant's "IQEYE3" mark, which in conjunction with the letter "Q" conveys the meaning of the term "IQ," both marks still share and readily project, in significant part, the connotation of the term "IQ." Both marks also prominently feature the word "EYE," which in the case of applicant's mark could be depicted, as it is in registrant's mark, in lower case letters with the remaining lettering in all capital letters, i.e., IQeye3. See, e.g., Phillips Petroleum Co. v. C. J. Webb, Inc. 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971) [a mark registered in typed or standard character form is not limited to the depiction thereof in any special form]; and INB National Bank v. Metrohost Inc., 22 USPQ2d 1585, 1588 (TTAB 1992) ["[a]s the *Phillips Petroleum* case makes clear, when [an] applicant seeks a typed or block letter registration of its word mark, then the Board must consider all reasonable manners in which ... [the word mark] could be depicted"]. It consequently is not a valid argument to contend, as applicant does, that there is a distinguishable difference in appearance between its mark and registrant's "design" mark. See, e.g., Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983), in which it was pointed out that (*italics in original*):

[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a *difference* cannot legally be asserted by that party. .... Thus, ... the displays must be considered the same.

In addition, the fact that applicant's mark ends with the numeral "3" while registrant's mark does not contain such a term or any other number is simply not a sufficient basis on which to predicate a finding of no likelihood of confusion. In this regard, it would appear from the nature of applicant's goods that its computerized, digital security and surveillance cameras, and registrant's legally identical digital cameras, would be marketed primarily to sophisticated purchasers, such as home and/or business security monitoring firms, rather than to ordinary consumers. It is well established, however, that the fact buyers are knowledgeable and discriminating as to the goods required to meet their business equipment needs and therefore would be expected to exercise care and deliberation in their choice of goods "does not necessarily preclude their mistaking one trademark for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also *In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986); *In re Decombe*, 9 USPQ 1812, 1814-15 (TTAB 1988); and *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983). Thus, even assuming that the sophisticated purchasers of applicant's and registrant's goods would notice the numeral "3" in applicant's mark, such number nonetheless would most likely be regarded as suggesting, in conjunction with the word "EYE," that applicant's "computerized digital cameras for use in security and surveillance applications" provide a "third



eye" with respect to providing protection of people and/or places and things, just as registrant's digital cameras function so as to provide an extra "eye" for watching and safeguarding purposes.

Accordingly, we conclude that purchasers who are familiar or otherwise acquainted with registrant's stylized "EYE Q" mark for, in particular, "digital cameras" would be likely to believe, upon encountering applicant's substantially similar "IQEYE3" mark for "computerized digital cameras for use in security and surveillance applications," that such legally identical products emanate from, or are otherwise sponsored by or affiliated with, the same source.

**Decision:** The refusal under Section 2(d) is affirmed.